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IN THE
SUPREME COURT OF CALIFORNIA
October Term, 1994

No. _____

ROBERT JACK VOAKES,

Petitioner,

v.

AT&T COMMUNICATIONS, INC. and
TIM ESPINOZA,

Respondents.

Petition for a Writ of Certiorari to the California Court of Appeals First Appellate District, Division 3

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. WHETHER THE "RELATE TO" STANDARD OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT [29 USCS §1144(a)] IS SO EXPANSIVE AS TO PREEMPT AN EMPLOYEE'S STATE LAW CAUSES OF ACTION BASED ON BEING TERMINATED FOR NOT RETURNING TO WORK PURSUANT TO THE ADVICE OF HIS PERSONAL PHYSICIAN, WHO WAS NOT ASSOCIATED WITH THE EMPLOYER'S BENEFITS PLAN.

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PETITION FOR WRIT OF CERTIORARI

ROBERT JACK VOAKES [herein "Petitioner"] respectfully petitions for a Writ of Certiorari to review the judgment of the California Court of Appeals, First Appellate District, Division 3.

OPINIONS BELOW

The opinion of the Court of Appeals (App., infra, p. a-1) is reported at 21 Cal. App. 4th 1673 [Jan. 1994]. The ruling of Alameda County Superior Court on the Motion for Summary Judgment and Motion to Strike of Respondents AT&T COMMUNICATIONS, INC. and TIM ESPINOZA [hereinafter "Respondents"], is not reported. The Court's written order of the proceeding of that motion is included in the appendix (App., infra, p. a-35). The ruling of the United States District Court, Northern District of California on the Motion for Summary Judgment of Respondents is not reported. The Court's written order in the proceeding on that motion is included in the appendix (App., infra, p. a-37]. The ruling of the Supreme Court of the State of California on petition for review (App., infra, p. a-44) is not reported.

JURISDICTION

The judgment of the California Court of Appeals, First Appellate District, Division 3, was entered on January 25, 1994. A Petition for Review was denied by the Supreme Court of the State of California on April 21, 1994. The jurisdiction of this Court is invoked under 28 USCS §1254(1).

STATUTE INVOLVED

Employee Retirement Income Security Act of 1974

29 USCS §1144, Other Laws.

(a) Supersedure; Effective Date

Except as provided in subsection (b) of this section, the provisions of this title and Title IV shall supersede any and all State Laws insofar as they may now or hereafter relate to any employee benefit plan described in Section 4(a) [29 USCS §1003(a)] and not exempt under Section 4(b) [29 USCS §1003(b)].

STATEMENT OF THE CASE

Petitioner was employed by AT&T for approximately fifteen years between July, 1973

and February, 1988. During his appointment, Petitioner continuously received outstanding work performance evaluations without ever being counseled for poor work performance. Petitioner received eight promotions, three merit raises and awards for outstanding performance or exceptional contribution to the company. During this time, Petitioner was led to believe that he would continue to remain employed as long as his performance was satisfactory and if he complied with all of AT&T's policies and procedures found in AT&T's Personnel Guide.

After being transferred to AT&T's office in Pleasanton, California in September, 1987, Petitioner was assaulted by his supervisor, TIM ESPINOZA ("ESPINOZA"), who had developed hostility towards Petitioner. Subsequent to his assault, Petitioner was stricken with kidney stones and due to surgical complications, almost died. From this period until being terminated, Petitioner was on disability leave from AT&T and was required by

AT&T to undergo examinations by physicians and psychiatrists from AT&T's Health Affairs Department. Petitioner was examined four times between November, 1987 and January, 1988. The AT&T physicians determined as of February 8, 1988, Petitioner was no longer totally disabled and would not be entitled to disability benefits under AT&T's Sickness and Accident Disability Plan ("the Plan"). While Petitioner was informed by ESPINOZA on behalf of AT&T's management that Petitioner must return to work by February 22, 1988, Petitioner's own doctor had advised Petitioner not to return to work until March 28, 1988. When Petitioner did not return to work by the date AT&T's management set, Petitioner was fired by ESPINOZA for "abandoning his job".

Petitioner filed his original Complaint on September 27, 1988 in the Alameda County Superior Court alleging, among other things, breach of contract, breach of the implied covenant of good faith and fair dealing, intentional infliction of emotional distress

and assault and battery against ESPINOZA. On October 27, 1988, Respondents filed a Petition to Remove the Action to the United States District Court, Northern District of California on the grounds Petitioner's claims were preempted by the Employee Retirement Income Security Act ("ERISA"). Petitioners countered with a Motion to Remand and on May 31, 1989, Judge Alfonso Zirpoli found that none of Petitioner's claims had a connection or reference to AT&T's ERISA plan (App., infra, pp. a-42-43). The claims instead related to Petitioner's employment contract with AT&T and, therefore, the Court found no preemption and remanded the matter back to the Alameda County Superior Court (App., infra, pp. a-42-43).

At the Superior Court, Respondents filed a Motion for Summary Judgment, again, based on ERISA preemption. On February 26, 1993, Judge Ronald Sabraw denied Respondent's motion holding a triable issue in fact existed whether if after fifteen years under an

employment contract, Petitioner was entitled to further good cause before termination and whether good cause existed to terminate Petitioner's employment when he waited for his own doctor to certify his health before returning to work (App., infra, p. a-36).

On January 25, 1994, Respondent appealed the Superior Court's decision to the Court of Appeal, First Appellate District, Division 3. Judge Werdegar of the Appellate Court reversed, granting Respondent's Motion for Summary Judgment since Petitioner did not sever his claim's connection to ERISA since the rights of the parties could not be determined without examining the Plan's procedures for challenging an ERISA benefits decision and the enforceability of AT&T's benefits decision (App., infra, pp. a-30-31).

REASONS FOR GRANTING THE WRIT

A. A COURT'S INTERPRETATION OF ERISA'S "RELATE TO" STANDARD SHOULD NOT BE EXPANDED TO INCLUDE EMPLOYEES STATE LAW CAUSES OF ACTION WHICH ALLEGE ALTERNATIVE THEORIES OF LIABILITY TO THE BENEFIT PLAN OR WHICH HAVE A TOO TENUOUS, REMOTE OR PERIPHERAL EFFECT ON THE EMPLOYER'S DISABILITY PLAN.

1. ERISA PREEMPTION GENERALLY

The Employee Retirement Income Security Act ("ERISA") found at 29 USCS §1001 et. seq., comprehensively regulates employee welfare benefit plans [Pilot Life Ins. Co. v. Dedeaux 481 U.S. 45 (1987)]. The purpose of the preemption section (29 USCS §1144(a)] was intended to "insure that plan and plan sponsors would be subject to a uniform body of benefit law; the goal was to minimize the administrative and financial burden of complying with conflicting directives among States or among States and the Federal Government" [Ingersoll-Rand Co. v. McClendon 498 U.S. 133, 142 (1990)].

ERISA's preemption provision under §1144(a)

supersedes any and all state law insofar as they may now or thereafter relate to any employee benefit plan. The Supreme Court has held the preemption clause is deliberately expansive and designed to establish pension plan regulation as exclusively a federal concern [Pilot Life, Supra, at p. 46].

The words "relate to" are to be given their "broad common-sense meaning" [Metropolitan Life Insurance Co. v. Massachusetts 471 U.S. 724 (1985)]. Further, a state law will be preempted if it has a connection with or reference to a benefit plan [Shaw v. Delta Airlines, Inc. 463 U.S. 85 (1983)]. Preemption also extends to state law causes of action that do not explicitly refer to employee benefit plans [Ingersoll, Supra, at p. 139]. Further, preemption has been found where plaintiff's claims, although formed under theories of state common law, were really ways of restating claims for employee benefits governed by ERISA [Pilot Life, supra,

at pp. 46-57]. However, some claims have to tenuous, remote or peripheral effect on benefit plans to fall within ERISA's preemption force [Shaw, supra, at page 106, N. 2].

2. DISTINGUISHABLE PREEMPTION CASES

Petitioner's action is unlike any of the cases cited by respondent to demonstrate the expansiveness of ERISA's preemption in the courts below or by any other cases holding ERISA preemption of various state law actions. Petitioner does not seek damages for negligent administration or mismanagement of benefit claims as found in Spain v. Aetna Life Ins. Co. 11 F.3d 129 (9th Cir. 1993). Petitioner did not allege, as the Court of Appeals found relying on Spain, that the damages sought were from an erroneous decision under AT&T's disability plan (App., infra, pp.a-31-32). Petitioner also does not claim AT&T improperly processed his claim for benefits under the disability plan as found in Pilot Life Ins.

Co. v. Dedeaux 41 U.S. 45 (1987). Nor has petitioner sought re-implementation of the benefits and coverages of the disability plan as in Metropolitan Life Ins. Co. v. Taylor 41 u.S. 39 (1987). Additionally, plaintiff has never requested a determination of the administration policies of AT&T'S disability plan.

Further, the cases which hold that the plaintiff has no cause of action if no benefit plan existed are inapplicable to the present case. The Supreme Court in Ingersoll-Rand supra, 498 U.S. 133, held "ERISA preempted plaintiff's wrongful discharge claim based on allegations that his discharge was based on the employer's desire to avoid making contributions to his pension fund (At p. 140). In analyzing Plaintiff's claim, the court had to look at the employer's benefit plan and therefore the action was preempted (Ibid). Likewise in Van Camp v. AT&T Information Systems 963 F.2d 119, 123 (6th Cir. 1992), the

court, in analyzing plaintiff's claim that his retirement was forced by age and sex discrimination, had to look at employers retirement plan. The court held the resolution of the dispute turned on the benefits a voluntary retiree is entitled to under the ERISA plan (Ibid).

3. CASES SUPPORTING PETITIONER'S CAUSES OF ACTION NOT PREEMPTED BY ERISA

Several cases support Plaintiffs causes of action for breach of contract and wrongful termination for not being preempted by ERISA. In Sorosky v. Burroughs Corp. 826 F.2d 794 (9th Cir. 1987), Plaintiff's causes of action for breach of employment contract and wrongful termination included more than one theory of liability and damages. Plaintiff alleged he was discharged without good cause. To the extent that plaintiff's causes of actions had no relationship and were independent from the benefit plan, the court held that these causes of action were not preempted (At p. 800).

Following Sorosky, the court in Barnick v. Longs Drug Stores, Inc. (1988) 203 Cal. 3d 377 also found no ERISA preemption for the same causes of action since plaintiff also relied on theories that had no relation to the benefit plan. The plaintiff in Barnick had alleged his employer violated his employment policies and procedures in terminating plaintiff and depriving him of income and benefits due under the employment contract (At p. 382).

Additionally, in finding no ERISA preemption, the court in Schlenz v. United Airlines, Inc. 678 F. Supp. 230, 234 (N.D. Cal. 1988), held that Congress did not intend ERISA to prevent a plaintiff from recovering for state law violations where an employer's conduct was the product of mixed motives. Plaintiff's claim for wrongful discharge, including claims for lost wages and future benefits, was not preempted since plaintiff alleged sufficient proof that a trier of fact could infer that

this motivated her employers decision to terminate her (Ibid).

4. PETITIONER'S CAUSES OF ACTION ARE UNRELATED TO AT&T'S DISABILITY PLAN AND ARE TO TENUOUS, REMOTE OR PERIPHERAL TO HAVE AN EFFECT ON THE PLAN.

The crux of petitioners claim is that in terminating petitioner, AT&T breached its entire employment contract with him. Petitioner alleges that through fifteen years of excellent service to the corporation shown by his outstanding work evaluations, promotions, raises and awards, AT&T violated its Personnel Guide by not following its policies and procedures and discharged petitioner without good cause. Further, that the decision to terminate the plaintiff was also based on the conflict between petitioner and his supervisor ESPINOZA rather by the decision that plaintiff was no longer disabled as determined by AT&T's physicians.

AT&T's disability plan is administered by a benefits committee. The benefits committee

delegates to AT&T's Health Affairs Department the responsibility for evaluating and monitoring AT&T's employee's medical condition and advising the benefits committee of its disability determination (Respondents Request for Immediate Stay, 8: 10-24).

Throughout the litigation of this case, petitioner has not directed its challenge to the validity of AT&T's Sickness and Accident Disability Plan which only makes up one part of petitioners entire employment contract. The decision to terminate petitioner was solely the decision of AT&T's management and was not the decision of the benefits committee or AT&T's physicians.

Petitioner does not contend that AT&T's management may rely on the benefits committee decisions from the report of its doctors. Petitioner has never alleged a conspiracy between the doctors and AT&T's management. The benefits committee through its physicians,

simply made the a decision that petitioner was no longer totally disabled and not entitled to benefits. Even if AT&T's management was justified in relying on the determination of the benefits committee, the benefits committee's determination did not give the management the right to terminate plaintiff without good cause and without following its polices and practices in its Personnel Guide. The disability plan documents contain no language indicating that an employee must be terminated if the employee fails to return to work after the disability plan doctors determine the employee is no longer totally disabled. In the two separate Summary Judgment motions, Petitioner has alleged he did not willfully refuse to return to work, but would have upon his personal doctor's permission (who was not associated with AT&T's benefits plan) despite AT&T's doctors concluding petitioner was not totally disabled.

The petitioner's theory of liability for his breach of contract and wrongful termination actions arise from AT&Ts' management's failure to terminate petitioner without good cause, failing to follow its Personnel Guide polices and procedures and by the personal conflict between AT&T's supervisor ESPINOZA and petitioner. These theories are unrelated to AT&T's disability plan and have no effect on the plan itself. Moreover, the rights of the parities can be determined without examining AT&T's disability plan procedure and the enforceability of AT&T's benefit committee's decision to terminate petitioners disability benefits. Following the Court's decisions in Sorosky, Barnick and Schlenz, Petitioner's causes of action should not be preempted by ERISA.

CONCLUSION

The lower courts interpretation of ERISA's "relate to" standard found at §1144(a) has been far to broadly applied in this case and potentially may in many more similar cases. Although ERISA's preemption is far reaching to many State common-law actions, those complaints which allege theories of liability having no relationship to a benefit plan or that are to tenuous, remote or peripheral to effect a benefit plan should not be allowed to be preempted by ERISA. Case law has shown that ERISA's preemption has some limitations which cannot be ignored. For these various reasons, this Petition for Certiorari should be granted.

RESPECTFULLY SUBMITTED,

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APPENDIX

AT&T Communications, Inc. v. Superior Court [21 Cal.App.4th 1673]

[No. A061071.

First Dist., Div. Three.

Jan. 25, 1994.]

AT&T COMMUNICATIONS, INC., et al., Petitioners, v. THE SUPERIOR COURT OF ALAMEDA COUNTY, Respondent; ROBERT JACK VOAKES, Real Party in Interest.

SUMMARY

An employee brought an action for wrongful termination in breach of contract and the covenant of good faith and fair dealing after he was terminated for not returning to work when medically cleared by his employer's physicians, although the employee's personal physician advised him he was not ready to return. The matter was removed to federal court, but was remanded with an explanation of why it was not preempted by the Employee Retirement Income Security Act (ERISA) (29 U.S.C. §1001 et seq.). The trial court denied

U.S.C. §1001 et seq.). The trial court denied the employer's motion for summary adjudication, made on the ground that the action related to the employer's ERISA benefit plan and was preempted. (Superior Court of Alameda County, No. H-136581-8, Ronald M. Sabraw, Judge.)

The Court of Appeal issued a peremptory writ of mandate directing the trial court to vacate its order denying the employer's motion for summary adjudication and to enter a new order granting the motion. The court held that, although the employee did not seek benefits under the plan, the wrongful termination action depended on the employee's underlying theory that he could rely on his own physician's advice about when to return to work and therefore on his continuing disability. By implication, the allegations suggested the employer violated its own sickness and accident disability policies. The determinative factor on preemption was not

whether the employee sought disability benefits, but whether the facts that led to his termination were intimately tied to the ERISA plan. Further, the court held, because the evidence presented at the summary adjudication stage described a much different case from that presented to the federal court, its determination that there was no preemption could not be relied on as law of the case.

(Opinion by Werdegar, J., with White, P. J., and Merrill, J., concurring.) <*pg.1674>

HEADNOTES

Pensions and Retirement Systems §13–Employee Retirement Income Security Act (ERISA)–Preemption–Scope.

1. Under 29 U.S.C. §1144(a) (Employee Retirement Income Security Act (ERISA) preempts state laws that "relate to" any

employee benefit plan), a state law will be preempted if it has a connection with or reference to such a plan. A state law may "relate to" a benefit plan, and thereby be preempted, even if the law is not specifically designed to affect such plans, or the effect is only indirect. ERISA preemption extends even to state common law causes of action that do not explicitly refer to employee benefit plans. If ERISA claims are pleaded as state law claims, they must be tried under federal law when stripped of their state law disguises. Although the title of ERISA refers to retirement and many provisions govern pension plans, the act covers various employee welfare benefit plans, including health and disability plans.

Pensions and Retirement Systems §13—Employee Retirement Income Security Act (ERISA)—Preemption—Scope—Wrongful Termination Action.

2. Under 29 U.S.C. §1144(a) (Employee

Retirement Income Security Act (ERISA) preempts state laws that relate to any employee benefit plan), as applied to wrongful termination actions, an employee's claim that the employer terminated employment in order to avoid paying pension or health benefits is preempted. However, where the employee alleges mixed motives for termination, some of which do not relate to ERISA benefits, the unrelated portions of the complaint will not be preempted. An employee may pursue state wrongful termination claims if they are unrelated to ERISA. Preemption depends on the factual basis for the complaint, not on whether the complaint on its face states a cause of action under ERISA. If ERISA authorizes an employee's civil action to enforce the same rights, a state law action to do so is preempted.

Courts §33—Decisions and Orders—Law of the Case—Preemption.

3. In a wrongful termination action, the

trial court erred in denying the employer's motion for summary adjudication, where the action related to the employer's employee benefit plan and was preempted by the Employee Retirement Income Security Act (ERISA) (29 U.S.C. §1001 et seq.), notwithstanding that the matter previously had been removed to federal court, and remanded back to state court with an explanation of why it was not preempted. Because the evidence presented at the summary adjudication stage described a much different <*pg.1675> case from that presented to the federal court, its decision could not be relied on as law of the case. The doctrine of law of the case applies only to appellate court decisions; a remand ruling is a jurisdictional ruling, not a final judgment on the merits of the preemption defense. Also, law of the case does not apply if intervening decisions have clarified or altered controlling rules of law (as had recent decisions emphasizing the expansive breadth of ERISA preemption). The federal court ruling

was based on the pleadings, not on the factual presentation at the summary adjudication stage.

Pensions and Retirement Systems §13–Employee Retirement Income Security Act (ERISA)–Preemption–Scope–Wrongful Termination Action.

4. In an action for wrongful termination in breach of contract and the covenant of good faith and fair dealing, by an employee who was terminated for not returning to work when medically cleared by his employer's physicians, although the employee's personal physician advised him he was not ready to return, the trial court erred in denying the employer's motion for summary adjudication, since the action related to the employer's employee benefit plan and thus was preempted by the Employee Retirement Income Security Act (ERISA) (29 U.S.C. §1001 et seq.). By implication, the allegations suggested the employer violated its own sickness and

accident disability policies. The facts that led to termination were intimately tied to the ERISA plan. The employee focused on procedures leading to his termination. Although he did not seek benefits under the plan, the wrongful termination action depended on the employee's underlying theory that he could rely on his own physician's advice about when to return to work and therefore on his continuing disability.

[See 2 Witkin, Cal. Procedure (3d ed. 1985) Jurisdiction, §60.]

COUNSEL

Seyfarth, Shaw, Fairweather & Geraldson, William J. Dritsas and Kathryn K. Morrison for Petitioners.

No appearance for Respondent.

Ivan O. B. Morse for Real Party in Interest.

OPINION

WERDEGAR, J.

We consider whether the Employee Retirement Income Security Act of 1974 (ERISA), 29 United States Code section 1001 et seq., <*pg.1676> preempts an action brought under state law for wrongful termination where an employee was terminated for not returning to work when medically cleared by his employer's physicians.

"ERISA includes a 'virtually unique pre-emption provision' [citation], which provides: 'Except as provided in subsection (b) of this section [the saving clause], the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan ....' (§514(a), as set forth in 29 U.S.C.

1144(a) (preemption clause).)" (Barnick v. Longs Drug Stores, Inc. (1988) 203 Cal.App.3d 377, 381 [250 Cal.Rptr. 10].) AT&T Communications, Inc. (AT&T) has an ERISA benefit plan that includes health and disability coverage. AT&T directed Robert Jack Voakes to return to work after AT&T doctors determined his nonindustrial disability had ended. Voakes's personal physician advised him he was not ready to return, and he did not. AT&T terminated him.

Voakes sued AT&T for wrongful termination. He asserts he was the target of an unlawful conspiracy by his supervisor and others to terminate his employment; he does not seek disability benefits. AT&T contends, however, Voakes's action relates to the ERISA benefit plan and is preempted. We agree with AT&T. Raising, as it does, the issue of whether Voakes could ignore the benefits decision of AT&T and follow the advice of his own physician, the action directly relates to

the benefit plan. The superior court erred in denying AT&T's motion for summary adjudication. We direct issuance of a peremptory writ of mandate.

Facts and Procedures

According to his first amended complaint filed in Alameda County Superior Court, Voakes began his employment with AT&T in 1973. In September 1987, he transferred to the company's Pleasanton, California, facility where Tim Espinoza was his new supervisor. According to Voakes, in late September 1987 Espinoza put a clenched fist to Voakes's chest and verbally threatened him. Shortly afterwards, while in Arizona, Voakes was admitted to the hospital for a kidney stone operation. He was released from the hospital on October 10, 1987, but medical complications followed. His personal physician did not release him to return to work until March 28, 1988. In the meantime, on February 22, 1988, AT&T terminated his employment. Voakes's

complaint against AT&T and Espinoza alleged wrongful termination in breach of contract and the covenant of good faith and fair dealing, intentional infliction of emotional distress, and, against Espinoza only, assault and battery. <*pg.1677>

AT&T sought summary adjudication of the wrongful termination causes of action and to strike part of the emotional distress cause of action on the ground these parts of the complaint were preempted by ERISA. AT&T supported the motion with evidence Voakes was covered by the AT&T sickness and accident disability plan. The plan is administered by AT&T's employee benefit committee, which delegates to the health affairs department the responsibility for evaluating an employee's medical condition.

At first, the health affairs department certified Voakes as disabled and he received benefits under the plan. On February 1, 1988,

based on reports by three doctors from AT&T's medical department and by an independent psychiatric consultant, the health affairs department concluded Voakes was able to return to work. On February 5, 1988, AT&T notified Voakes in Arizona he was to report back to work in Pleasanton on February 22, 1988. AT&T extended his disability status to February 8 and provided a paid personal leave of absence from February 9 to February 22. The letter from Espinoza told him the company could not condone any unexcused absences and if he failed to return to work February 22, they would consider he had abandoned his position and would terminate his employment. He failed to return to work on February 22 and was notified of his termination.

On March 21, 1988, the benefit committee reviewed Voakes's claim for additional benefits and approved the health affairs department finding he was not disabled after February 8, 1988. Voakes was informed by

letter of the decision and of his right to appeal. He requested his case be resubmitted to the benefit committee because he had been unable to submit additional documentation. The committee granted his request, but Voakes did not submit additional documentation; neither did he appeal the benefit committee's subsequent decision on reconsideration.

In opposing summary adjudication, Voakes presented scant evidence to contradict AT&T's submission. Instead, he primarily disagreed with AT&T about the legal effect of the evidence. He asserted his claim was for breach of the entire employment contract, not the benefit determination by AT&T. He argued a federal court remand order prevented a finding of ERISA preemption and there was a triable issue of material fact whether he refused to return to work or was properly relying upon the medical opinion and conclusions of his own doctors. He presented evidence the United States District Court had remanded the case to

state court with a finding the claims were not preempted by ERISA. He "[d]isputed" many of AT&T's statements of undisputed material fact, not because of contradictory evidence, but because he had not yet deposed declarants and he lacked information. His factual submission focused on his deposition, in which he described the cursory examinations conducted by the AT&T doctors. <*pg.1678>

After hearing, the court denied AT&T's motion, finding: "A triable issue of fact exists and Defendant has not carried the burden on the following issues: [¶] a. Is Plaintiff under the alleged employment contract, and after 15 years of employment under that contract, entitled to further good cause before termination; and [¶] b. Was the fact that the Plaintiff waited for his own doctor to certify his health before returning to work, good cause to terminate his employment." This petition followed.

Discussion

I.ERISA Preemption Generally

[1] "ERISA's provisions 'supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan.' ERISA §514(a), 29 U.S.C. §1144(a). The Supreme Court has consistently emphasized the expansiveness of the 'relate to' standard and its purpose of establishing the regulation of pension plans as an exclusively federal concern. [Citations.] The words 'relate to' are to be given their 'broad common-sense meaning,' [citation], and a state law will be pre-empted 'if it has a connection with or reference to such a plan.' [Citation.]" (Christopher v. Mobil Oil Corp. (5th Cir. 1992) 950 F.2d 1209, 1217-1218.) "[A] state law may 'relate to' a benefit plan, and thereby be pre-empted, even if the law is not specifically designed to affect such plans, or the effect is only indirect. [Citations.]"

(Ingersoll-Rand Co. v. McClendon (1990) 498 U.S. 133, 139 [112 L.Ed.2d 474, 484, 111 S.Ct. 478].)

"... ERISA preemption extends even to state common-law causes of action that 'do not explicitly refer to employee benefit plans.' [Citation.] Thus, many courts have found preemption where the plaintiff's claims, although formed under theories of state common-law, were really ways of restating claims for employee benefits governed by ERISA. [Citations.]" (Harlan v. Sohio Petroleum Co. (N.D.Cal. 1988) 677 F.Supp. 1021, 1028.) If ERISA claims are pleaded as state law claims, they must be tried under federal law "when stripped of their state law disguises." (Tingey v. Pixley-Richards West, Inc. (9th Cir. 1992) 953 F.2d 1124, 1130.)

Although the title of ERISA refers to retirement and many provisions govern pension plans, the act covers various employee welfare

benefit plans, including health and disability plans. (29 U.S.C. §§1002 (1) & (3), 1003 (a).) Voakes does not claim AT&T's plan is outside ERISA. The only issue is whether Voakes's wrongful termination action "relate[s]" to ERISA for preemption purposes.

II. Preemption of Wrongful Termination Actions

[2] Several opinions have discussed ERISA preemption of wrongful termination actions. The usual context is an employee's claim the employer <*pg.1679> terminated employment in order to avoid paying pension or health benefits. Such a claim is preempted. (See Ingersoll-Rand Co. v. McClendon, supra, 498 U.S. 133; Felton v. Unisource Corp. (9th Cir. 1991) 940 F.2d 503; Nishimoto v. Federman-Bachrach & Associates (9th Cir. 1990) 903 F.2d 709; Sorosky v. Burroughs Corp. (9th Cir. 1987) 826 F.2d 794.) However, where the employee alleges mixed motives for

termination, some of which do not relate to ERISA benefits, the unrelated portions of the complaint will not be preempted. An employee may pursue state wrongful termination claims if they are unrelated to ERISA. (See Tingey v. Pixley-Richards West, Inc., supra, 953 F.2d at p. 1131; Schlenz v. United Airlines, Inc. (N.D.Cal. 1988) 678 F.Supp. 230, 235.)

Preemption depends upon the factual basis for the complaint, not whether the complaint on its face states a cause of action under ERISA. If ERISA authorizes an employee's civil action to enforce the same rights, a state law action to do so is preempted. (Felton v. Unisource Corp., supra, 940 F.2d at pp. 507-508.)

Sorosky v. Burroughs Corp., supra, 826 F.2d 794 and Barnick v. Longs Drug Stores, Inc., supra, 203 Cal.App.3d 377, following Sorosky's example, demonstrate the fine line courts must walk in determining whether

wrongful termination actions are preempted. Sorosky's employer laid him off when it closed a major portion of its Santa Barbara facility. He brought an action for breach of contract/wrongful discharge, alleging several different theories. Some of the allegations related to the company's retirement benefit plan. The Sorosky court held these allegations were preempted. Other allegations, such as Sorosky's claim of discharge without good cause, had no relationship to the benefit plan. The court held these were not preempted. (Sorosky v. Burroughs Corp., supra, 826 F.2d at pp. 798, 800.) Claims for age discrimination were not preempted, but the court found Sorosky's evidence insufficient to raise a triable age-discrimination issue. (Id at pp. 800, 803-804.)

In Barnick v. Longs Drug Stores, Inc., supra, 203 Cal.App.3d 377, Barnick alleged Longs fired him without cause. In a deposition and in answers to interrogatories, Barnick

then contended Longs fired him to prevent his ERISA plan benefits from vesting. Longs countered with a motion for summary judgment on federal preemption grounds. (Id at p. 379.) The Barnick court examined each of the five causes of action. Although each repeated general allegations about the existence of an ERISA plan, the court concluded some of the theories upon which Barnick relied had no relationship to the plan. Those portions of the complaint alleging violation of employment policies unrelated to the ERISA plan and termination for refusing to violate state statutes were not preempted. (Id at p. 383.) <*pg.1680>

III. The Federal District Court's Remand Order

[3] On October 28, 1988, shortly after Voakes filed his complaint, AT&T removed the matter to federal court. On May 31, 1989,

Judge Alfonso J. Zirpoli remanded the case with a five-page explanation why it was not preempted by ERISA. Without mentioning the doctrine of law of the case, Voakes asserts here that the ERISA preemption question has previously been decided in his favor, implying that this court may not revisit the issue.

Several obstacles prevent Voakes from relying upon Judge Zirpoli's decision as law of the case: (1) the doctrine of law of the case applies only to appellate court decisions (Provience v. Valley Clerks Trust Fund (1984) 163 Cal.App.3d 249, 256 [209 Cal.Rptr. 276]); (2) a remand ruling is a jurisdictional ruling, not a final judgment on the merits of the preemption defense (Whitman v. Raley's Inc. (9th Cir. 1989) 886 F.2d 1177, 1181); (3) law of the case does not apply if intervening decisions have clarified or altered controlling rules of law, as have recent decisions emphasizing the expansive breadth of ERISA preemption (Provience v. Valley Clerks

Trust Fund, supra, at p. 256); and (4) the federal court ruling was based on the pleadings, not upon the factual presentation at the summary adjudication stage.

Although Judge Zirpoli's decision does not dictate the result here, we pause to consider whether its reasoning should be applied to the evidence presented at the summary adjudication stage. Judge Zirpoli's position was: (1) Voakes's complaint addressed breach of an employment contract, including a provision not to terminate him because of injury or medical leave; (2) the complaint did not allege Voakes was terminated for exercising his rights under the ERISA plan or in order to prevent him from exercising those rights; (3) the complaint did not allege that sickness and accident disability leave policies were contained in the ERISA plan; and (4) even if AT&T's sickness and accident disability policies were contained in an ERISA plan, the agreement not to terminate was not

part of the ERISA plan.

Judge Zirpoli's remand was based on the allegations of the complaint. He seems to have concluded the matter was not preempted because the complaint did not directly allege violation of ERISA, or an ERISA benefits contract, or interference with rights under ERISA. The first amended complaint alleged only that Voakes "at all times conformed with Defendant AT&T's company policies concerning sickness and accident disability leave," that he was under a doctor's direction not to resume work until March 28, 1988, and that in or about February 1988, while under a doctor's <*pg.1681> care, AT&T informed him he was to be terminated. Unless the original complaint—which was before Judge Zirpoli, but has not been furnished to us—provided more detail, it did not reveal to Judge Zirpoli that Voakes directly challenged the authority of AT&T's doctors to determine when he was fit to return to work; rather, it implied that the

only doctor Voakes had seen had not released him for work when the company terminated him. Neither did the complaint acknowledge Voakes's failure to follow ERISA plan appeal procedures to resolve his dispute with AT&T over the end of his disability. Because the evidence presented at the summary adjudication stage described a much different case from that presented to Judge Zirpoli, his ruling is not persuasive here.

IV. Application of the Law to This Case

[4] Under the decisional law described in parts I and II above, any portions of Voakes's complaint that relate to ERISA are preempted. To determine the issue, we examine the complaint, the evidence presented below, and Voakes's arguments to this court. Read in light of the evidence presented in connection with the summary adjudication motion, the complaint shows a direct relationship to the ERISA health and disability plan.

A. The Complaint

General allegations common to each cause of action allege AT&T terminated Voakes while he was under a doctor's direction not to return to work and while he was conforming to all AT&T's policies concerning sickness and accident disability. By implication, the allegations suggest AT&T violated its own sickness and accident disability policies by terminating Voakes. Even without the general allegations, the causes of action for breach of contract and for breach of the covenant of good faith and fair dealing relate to ERISA. Their primary allegation is breach of an agreement to employ Voakes as long as his performance was satisfactory. However, they also allege (1) the contract provided AT&T would adhere to company policies concerning medical and disability leave, and (2) AT&T breached the covenant of good faith and fair dealing by terminating Voakes because he was

unable to return to work after medical complications.

B. Evidence in Superior Court

The evidence submitted in connection with the summary adjudication motion shows the breach of contract and breach of the covenant of good faith and fair dealing causes of action hinge on Voakes's theory he could rely on his own physician's determination of when he would be fit to return <*pg.1682> to work, and AT&T could not terminate him for contravening the Health Affairs Department's different conclusion. Although Voakes does not frame them this way, the two central questions in his lawsuit are (1) what are the procedures for challenging an ERISA benefits decision on the termination of disability, and (2) what are the consequences of resisting the benefits decision without going through the established procedures for challenging the decision. These two questions directly involve the ERISA

benefit plan.

Even Voakes's arguments to the superior court demonstrate the close connection between his causes of action and the ERISA benefit plan. Voakes claimed below there was "a triable issue of material fact whether Plaintiff actually refused to return to work or whether he was properly relying upon the medical opinions and conclusions of his own doctors ... and therefore allowed to remain on medical disability until Plaintiff was properly cleared to return to work by his own physician...." Consequently, given the presentation before it, the superior court had no basis for denying summary adjudication.

C. Voakes's Arguments

Voakes seeks to sever the connection with ERISA by asserting in this court for the first time that on October 5, 1987, Espinoza "formed a group" to determine how to terminate

Voakes's employment. He does not disclose Espinoza's reason for conspiring, the details of the conspiracy, or how Espinoza planned to accomplish his objectives. Because Voakes failed to raise the issue of conspiracy below in his opposition to summary adjudication, these asserted facts cannot be used to support the superior court's ruling.

Even, moreover, were we to consider these assertions, we would reach the same result. To the extent Voakes relies on conspiracy, he impliedly paints the AT&T doctors as coconspirators and again confronts preemption by challenging the integrity of the health benefit plan. <fn 1> <*pg.1683>

Voakes also claims exemption from ERISA preemption because he does not seek reimbursement for wrongfully denied disability benefits and, further, the amount of lost benefits was inconsequential. He contrasts his case with those cited by AT&T in which the

litigants seek to reinstate retirement benefits. This case admittedly falls into none of the familiar patterns. The determinative factor on preemption, however, is not whether Voakes seeks benefits, but what facts led to his termination. As we have explained, the facts here are intimately tied to the ERISA plan.

Finally, Voakes focuses on procedures leading to his termination. He points out that management, not the benefit committee, terminated him, and he contends AT&T did not follow company procedures for solving its personnel problem. He asserts that temporary illness or disability is not a ground for termination. He claims AT&T policies allow a person with 15 years' service to stay off work for up to 54 weeks.

These arguments only reinforce our decision that ERISA preempts Voakes's causes of action. They return us to the central

questions: (1) what are the procedures for challenging a disability decision, and (2) could AT&T, over Voakes's resistance, enforce its decision he was no longer disabled. Espinoza sought to enforce AT&T's benefits decision. Voakes resisted. The rights of the parties cannot be determined without examining plan procedures and the enforceability of AT&T's benefits decision.

Our decision is fortified by the recent Ninth Circuit opinion in Spain v. Aetna Life Insurance Company (9th Cir. 1993) 11 F.3d 129. The plaintiffs there sought wrongful death damages because the decedent's employer improperly delayed authorizing the final part of a three-part bone marrow transplant. The plaintiffs did not seek benefits under the plan, but damages flowing from an erroneous decision under the plan. The Spain court nevertheless sustained a trial court ruling finding ERISA preemption.

Voakes's position here is analogous. He does not seek benefits under the plan, but compensation for a consequence of the allegedly erroneous decision—i.e., termination of his employment. As in Spain, his action directly relates to administration of the plan.

V. Conclusion

Voakes has not successfully severed the connection to ERISA. His wrongful termination action depends upon his underlying theory that he could rely upon his own physician's advice about when to return to work and therefore upon his continuing disability. The court erred in rejecting AT&T's contentions that the causes of action for breach of contract and breach of the <*pg.1684> covenant of good faith and fair dealing were preempted. We do not decide whether the court should have stricken parts of the emotional distress cause of action, because the parties have not

directly addressed the particular allegations AT&T sought to have stricken. <fn 2>

Disposition

Let a peremptory writ of mandate issue directing the Alameda County Superior Court to vacate its order denying the motion for summary adjudication and to enter a new order granting the motion.

White, P. J., and Merrill, J., concurred. <*pg.1685>

FOOTNOTE 1 Voakes challenges the plan's integrity without having followed the plan's administrative procedures. Under the plan, an employee whose claim is denied by the benefit committee may seek review from the review committee. Voakes abandoned administrative review procedures by failing to submit further documentation after the benefit committee

granted his request to do so and by never seeking review by the review committee.

Had Voakes followed these appeal channels, he would have either succeeded, and perhaps exposed the conspiracy, or failed, providing grounds for suspecting that the claimed conspiracy infected the health affairs department, benefit committee and review committee as well. Having exhausted the administrative remedies, Voakes would have been well-positioned to seek a remedy under ERISA with a claim AT&T employees conspired to use the ERISA plan procedures to terminate him.

FOOTNOTE 2 We express no opinion about whether, if requested, the superior court should permit Voakes to amend his complaint to state a claim for ERISA remedies. (See Commercial Life Ins. Co. v. Superior Court (1988) 47 Cal.3d 473, 485 [253 Cal.Rptr. 682, 764 P.2d 1059].)

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA

ROBERT JACK VOAKES, Plaintiff, v. AT&T COMMUNICATIONS, INC., a Delaware corporation, TIM ESPINOZA and DOES 1 through 50, inclusive, Defendants.	NO. H 136581-8 ORDER GRANTING MOTION TO STRIKE AND DENYING S U M M A R Y ADJUDICATION DATE: 2/26/93 TIME: 2:00 P.M. DEPT NO.: 30 TRIAL: 4/12/93

The motion of Defendant AT&T COMMUNICATIONS INC., and TIM ESPINOZA for summary adjudication and motion to strike cam on regularly for hearing before this court in Department Number 30, the Honorable Ronald M. Sabraw, Judge, presiding. Ivan O.B. Morse, of Morse & Associates appeared as attorney for Plaintiff and Kathryn K. Morrison of Seyfarth, Shaw, Fairweather & Geraldson appeared as attorney for Defendants AT&T COMMUNICATIONS, INC., and TIM ESPINOZA.

After full consideration of the evidence

and points and authorities and separate statements submitted by both parties, and oral arguments of counsel, it appears and the court finds the following:

1. The Motion to strike is Granted as to the last six words of Paragraph 8 and the last 5 words of Paragraph 20 of the First Amended Complaint filed June 19, 1990; and

2. The Defendants' Motion for Summary Adjudication is denied. A triable issue of fact exists and Defendant has not carried the burden on the following issues:

a. Is Plaintiff under the alleged employment contract, and after 15 years of employment under that contract, entitled to further good cause before termination; and

b. Was the fact that the Plaintiff waited for his own doctor to certify his health before returning to work, good cause to terminate his employment.

IT IS SO ORDERED.

DATED: 2/26/93

RONALD M. SABRAW
JUDGE OF THE SUPERIOR COURT

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ROBERT JACK VOAKES,

PLAINTIFF,

vs.

NO. C 88 4317 AJZ

AT&T COMMUNICATIONS, INC., a Delaware Corporation, TIM ESPINOZA and DOES 1 through 50, inclusive,

ORDER GRANTING PLAINTIFF'S MOTION TO REMAND

Defendants.

This case arises out of defendant AT&T's termination of plaintiff Robert Voakes's employment. Voakes claims that he was wrongfully terminated when he failed to return to work from a medical leave sooner than his doctor ordered him to return. Voakes also claims that defendant Tim Espinoza, an AT&T employee, assaulted and battered Voakes. Voakes now moves to remand the case to state court.

FACTS

On September 27, 1988, plaintiff filed his complaint in state court alleging wrongful discharge, breach of contract,

misrepresentation, breach of the covenant of good faith, and several other claims. On October 28, 1988, defendants removed the case from Alameda County Superior Court to this court on the basis of federal question jurisdiction.

DISCUSSION

Plaintiff contends that the case was improperly removed because plaintiff's claims do not arise under ERISA.

This court has jurisdiction over claims that are (1) preempted by the Employment Retirement Income Security Act (ERISA) and (2) redressable under section 502(a) of the Act, 29 U.S.C. §1132(a), because "Congress has 'so completely' preempted this area 'that any civil complaint raising [section 502(a)] claims is necessarily federal in character.'" Sorosky v. Buuoughs Corp., 826 F. 2d 794, 799 (9th Cir. 1987) (quoting Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 63-64 (1987)).

Therefore, the court must first determine

whether Voakes's claims are preempted by ERISA. In order to be preempted, the claims must "relate to" AT&T's employee benefit plan, that is, "they must have 'a connection with or reference to such a plan.'" Sorosky, 826 F. 2d at 799-800 (quoting Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 97 (1983)).

In the first cause of action, for wrongful discharge, plaintiff alleges that he and AT&T had an employment contract, which included AT&T's written personnel policies and manuals (¶ 19). He further alleges that he "conformed with . . . Defendant AT&T's company policies concerning sickness and accident disability leave" (¶ 21), that he "informed both Defendants . . . that he was under a doctor's direction not to resume work until March 28, 1988" (¶ 22), and that on approximately February 22, 1988, he was discharged for failing to return to work (¶ 23). In terminating plaintiff, he alleges, defendants breached the employment contract (¶ 24).

Plaintiff fails to allege specifically why AT&T's decision to terminate him amounted to a wrongful discharge, but the necessary implication from the allegations which he does include is plain: defendants breached the employment agreement by terminating plaintiff for failing to return to work before his doctor told him to do so even though plaintiff complied with company policy concerning disability leave, and this breach amounted to wrongful discharge.

In the second cause of action, for breach of contract, plaintiff alleges that, under the terms of the employment contract (a) plaintiff would be employed so long as his performance was satisfactory and (b) AT&T would adhere to company policies concerning medical and disability leave (¶ 29). He further alleges that AT&T breached the contract when it terminated his employment (¶ 28).

In the third cause of action, for breach of the covenant of good faith and fair dealing, plaintiff alleges that AT&T breached

the covenant by terminating plaintiff on the basis of his inability to return to work due to medical complications (¶ 33).

In the sixth and seventh causes of action, for misrepresentation, plaintiff alleges that AT&T told plaintiff that his position would be secure and that he would not be terminated because of injury or medical leave, and that AT&T knew or should have known that AT&T's statement was false (¶¶ 47, 50).

None of plaintiff's claims "have a connection with or reference to" AT&T's ERISA plan. Rather, the claims relate to AT&T's employment contract with Voakes. In substance, Voakes's claims relate to an agreement with AT&T that he would not be terminated because of injury or medical leave so long as he complied with the company's leave policy.[1]

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[1]Defendants assert that plaintiff alleges he complied with "the requirements of the Sickness and Accident Disability Plan." Opposition at 3. However, defendants fail to provide a citation for this assertion. Although plaintiff alleges that he "conformed with defendant AT&T's company policies

Voakes does not allege that AT&T terminated him for exercising his rights under the ERISA plan or in order to prevent him from exercising those rights. He merely alleges that AT&T's decision violated their employment agreement regarding leave policy. Accordingly, his claims are not preempted by ERISA.

Defendants contend that plaintiff's claims are preempted because they relate to

> the [improper] administration of an employee benefit plan. . . An essential element of Plaintiff's breach of contract cause of action is the allegation that Defendants failed to adhere to the ERISA-regulated company policies regarding medical and disability leave. Voakes is clearly seeking compensation for violation of the benefits contract and the termination of benefits.

This contention fails. First, Voakes's allegations state a claim for violation of the

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concerning sickness and accident disability leave," Complaint at ¶14, he does not indicate whether those policies are contained in the Plan. Moreover, even if those policies are contained in the Plan, plaintiff's claim is based upon AT&T's agreement that it would not terminate plaintiff so long as he complied with those policies, and the agreement itself is <u>not</u> part of the Plan.

employment contract, not for violation of the benefits contract. Second, although Voakes alleges that AT&T "failed to adhere to the ERISA-regulated company policies regarding medical and disability leave" and although he is seeking compensation, in part, for the termination of benefits, these two factors do not bestow upon his claims a "connection with or reference to" AT&T's ERISA plan.

Accordingly,

IT IS HEREBY ORDERED that plaintiff's motion to remand the case to Alameda County Superior Court is granted.

Dated: May 31, 1989

Alfonso J. Zirpoli
United States District Judge

First Appellate District, Division Three, No. A061071

S038238

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

AT&T COMMUNICATIONS INCORPORATED Et Al., Petitioners

v.

ALAMEDA COUNTY SUPERIOR COURT, Respondent

ROBERT JACK VOAKES, Real Party In Interest

Real Party In Interest's petition for review DENIED.
Lucal, C.J. did not participate.

MOSK
Acting Chief Justice